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No. 84-1974

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JIMMY C. ROSE, Warden,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

"Whether error in the state trial court's jury instructions on malice was harmless beyond a reasonable doubt?"

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INTEREST OF AMICUS CURIAE

The State of California appears as a friend of the Court in support of petitioner pursuant to Supreme Court Rule 36.4.

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SUMMARY OF ARGUMENT

The costs of automatic reversal would be high and would fall most severely on those states which by their waiver of procedural default rules are most open to claims of federal

constitutional error. We ask the Court to be very sure an automatic rule is truly necessary.

The harmless error rule replaces technicality with judgment. Judgment requires appraisal of the entire record, including the evidence, examining every factor which might inform as to the influence of error.

The Court steadfastly has remained committed to such judgment. In some cases, prejudice has been assessed as part of the determination whether error has occurred; in others, only after error is established; in still others, as a factor in deciding whether to overlook procedural default. But in all cases, including even those which "presume" prejudice, prejudice assessment is part of the exercise of judgment.

The Court ought not to retreat from this rule to hold presumption error

reversible per se on an abstract possibility of prejudice alone. Abstract analysis may appeal in logic, but as an exercise in judgment it fails. The large majority of circuit and state courts that have adopted harmless error rules for these kinds of cases caution strongly against concluding that the constitutional values at stake can only be protected by an automatic, abstract rule. Evidence and other circumstances of the case indubitably affect jury construction of instructions and the harm that might have been suffered. Cases that hold reversal must follow upon the possibility of unconstitutionality do not stand for the proposition that such circumstances and evidence must be ignored.

Harmless error rules serve, not subvert, constitutional values. The proper reach of a harmless error rule

is a function of the constitutional values at risk.

Burden-shifting presumptions implicate the constitutional interest in accurate and reliable verdicts. A prejudice requirement which asks whether such error has "undermined confidence in the outcome" will fully protect a defendant against any reasonable possibility of harm while leaving intact those convictions in which there is no reasonable doubt that the verdict is reliable. Conclusive presumptions implicate both the constitutional interest in accuracy and the defendant's interest in a nonjudicial factfinder. The latter interest is protected by a prejudice requirement which asks whether in light of all the evidence and circumstances there is a reasonable possibility the jury did not decide an essential issue.

Neither of these examinations should be made in the abstract. Many circumstances in addition to the evidentiary posture of the case may show beyond reasonable doubt that error caused no real harm to the constitutional interest at stake.

It is not necessary to adopt a rigid, automatic reversal rule. These tests will discover every case in which there is a risk of unjust conviction or of a material deprivation of jury fact-finding. That judgment will vary in each case as the circumstances vary does not impeach its legitimacy. We ask the Court not to retreat from its commitment to judgment.

ARGUMENT

I.

THE COSTS OF A RULE OF AUTOMATIC REVERSAL WILL BE HIGH, AND WILL BE FELT MOST SEVERELY BY THOSE STATES WHICH PRESENTLY ARE MOST OPEN TO CLAIMS OF FEDERAL CONSTITUTIONAL ERROR.

We wish to stress at the outset the considerable costs which would follow from a rule of automatic reversal, for we fear they could be underestimated. We ask the Court to be very sure, before adopting any rigid rule, that it is a genuine necessity.

We do not suggest there is much to fear from current "presumptions" cases. The chief lesson of Sandstrom v. Montana, Connecticut v. Johnson, and Francis v. Franklin[1/] may be never to use the word "presume." A judge who uses the term

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1. Sandstrom v. Montana, 442 U.S. 510 (1979); Connecticut v. Johnson, 460 U.S. 73 (1983); Francis v. Franklin, 105 S.Ct. 1965 (1985).

today, when the equally serviceable "may infer" is available, hasn't been paying attention. New cases containing such error will be few. See generally People v. Roder, 33 Cal.3d 491, 505-07 (1983) (all criminal presumptions affecting the burden of proof construed to be permissive inferences).

The difficulty lies rather in cases decided before adjustment to Sandstrom and in cases concerned with new issues in which Sandstrom principles are implicated.

In California, for example, the state supreme court has ruled the standard jury instruction concerning aiding and abetting has for some years been deficient in omitting specific reference to intent. People v. Beeman, 35 Cal.3d

547 (1984).[2/] It is being retroactively applied by the lower courts. E.g., People v. Olmedo, 167 Cal.App.3d 1085, 1091-92 (1985); People v. Henderson, 163 Cal.App.3d 1001, 1009 (1985).

The number of cases containing aiding and abetting instructions is legion. If, as the state supreme court suggested, the error is closely akin to Sandstrom error because it removes the issue of intent from the jury's

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2. The defective instruction required proof only that the aider and abetter "aids, promotes, encourages or instigates by act or advice the commission of such crime" "with knowledge of the unlawful purpose of the perpetrator of the crime." The California court ruled this sufficiently ambiguous to permit conviction upon an intentional act which aids without intent to encourage or facilitate, as where the aider and abettor aids negligently or accidentally through his intentional act. The court analogized the instruction to a presumption which effectively eliminates intent as an element by permitting conviction regardless of whether the trier of fact has found intent. People v. Beeman, 35 Cal.3d at 559-61.

consideration, People v. Beeman, 35 Cal.3d at 559, 561 n.4, and if, further, such error were deemed by this Court reversible per se, then the number of judgments which would have to be set aside would be extreme. Aging evidence, fading memories, missing witnesses, and other difficulties would lead to complete release of many defendants about whom there is absolutely no doubt of guilt.

Still more instructional ambiguities that a jury might have understood as eliminating need for proof of one element or another can be forecast. E.g., Carlos v. Superior Court, 35 Cal.3d 131 (1983)(felony-murder special circumstance requires proof that accomplice had intent to kill). The specific error at issue in Sandstrom may disappear, but the rule of review established for such kinds of error will have wide sweep.

It can be answered that the states may "insulate" themselves from these effects, if they wish, "by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977).

Not every state possesses this "normal" rule, and those that do often couch it with exceptions that historically have been liberally construed. E.g., Cal. Penal Code § 1259 ("The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendants were affected thereby.").

When this liberality of review is coupled additionally with the natural tendency of many intermediate appellate courts to "insulate" their decisions

from reversal by reliance on substantive lack of merit or harm as well as the procedural ground, the mechanism of control suggested in Hankerson is left toothless. See, e.g., Curry v. Wilson, 405 F.2d 110, 111-12 (9th Cir. 1968) (where California court relied both on waiver and the merits to reject claim, federal court will examine merits); cf. Engle v. Isaac, 456 U.S. 107, 124-25 nn.26-27 (1982); Hankerson, 432 U.S. at 244 n.8; Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967).

Ironically, it will be the states that have been most open to claims of federal constitutional error, most willing to examine the merits to search out injustice, which thus would be called upon to bear the heaviest burden of any rule of automatic reversal. Many, many decisions already have been rendered in which the state court

routinely has examined the merits and has not relied solely on a procedural default. If every one of those decisions thereby is made subject to automatic reversal without regard to harm whenever the inevitable habeas corpus petition is filed, a heavy price for sensitivity to constitutional concerns will have been exacted.

Were there something truly fundamental at stake in each such case, the burden would be willingly borne. But the error in Sandstrom-related cases may be largely hypothetical. The abstract possibility of error, a possibility expressly determined without regard for the total circumstances of the case, would be enough to compel reversal.

We offer an example. Two defendants by the overwhelming weight of the evidence jointly participated in executing their victim. One defendant

shot the victim with a shotgun, critically wounding but not immediately killing him. While the wounded man knelt begging for his life, the other defendant shot him in the head with a pistol. To prevent further splash of blood and tissue, this defendant then wrapped the victim's head in a towel before administering a final coup de grace.

Of the defendants' individual intent to kill, and intent to aid each other in the killing, there can be no doubt. That the jury must have found such intent likewise does not admit of reasonable doubt. Yet because mutual aiding and abetting instructions were given, instructions that omitted specific reference to intent, and because the state court examined the merits in the course of finding the error harmless, the case is open to

automatic reversal on habeas corpus should this Court establish an automatic reversal rule in this case. Neither defendant is likely to be retried as, fearing the defendants' eventual release, several key witnesses expressed an intent to "lose" themselves in other states after their testimony.

A state which is willing to overlook a lack of objection in a hundred such cases to search for that one where there may be a realistic possibility the defendant is innocent or was unjustly convicted may not be quite so willing if it later can be compelled to reverse every single one of the hundred. It may instead, perforce, answer the rigid federal rule with its own rigid state procedural rule, as the Court has suggested.

We submit this outcome is both unnecessary and detrimental to the best

interests of justice. A rule of review which takes realistic account both of the possibility of error and of harm is fully capable to sort out that case where the defendant indeed might be innocent or might have been deprived of his right to a jury trial without simultaneously requiring retrial or release of the ninety-nine as to whom there is no reasonable doubt. "What the harmless-error rules all aim at is a rule that will save the good . . . while avoiding the bad, so far as possible." Chapman v. California, 386 U.S. 18, 23 (1967).

II.

THE COURT SHOULD NOT RETREAT FROM JUDGMENT.

A.

The question certified for revie evinces the renewal of a very ol dispute. Historically, the Court ofte has been divided on the question o whether constitutional protections are s fundamental that any deprivation mus result in reversal, or whether when th possibility of error in the full contex of the case appears but slight, som constitutional errors may legitimately b deemed harmless.

The former view was that every erro necessitated reversal. Appellate court became "'impregnable citadels of techni- cality,'" trials "a game for sowin reversible error in the record . . . ." Kotteakos v. United States, 328 U.S. 750, 759 (1946).

The harmless error rule was a remedial effort by the great leaders of the profession

> to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors . . . will engender . . . .

Id. at 760.

Necessarily, Justice Rutledge observed, the command was easier to render than to observe.

> This [was] in part because it was general; but in part also

> because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance.

Kotteakos, 328 U.S. at 761 (citatio omitted)(emphasis added).

Certain "aids to right judgment were spelled out:

> Thus, it is not the appellate court's function to determine guilt or innocence. Nor is it

to speculate upon probable reconviction and decide according to how the speculation come out . . . . Those judgments are exclusively for the jury . . . .

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum . . . . [T]he question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had

> upon the jury's decision. . . .
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason.

Id. at 763-64 (citations omitted (emphasis added).

The emphasis throughout is upo judgment, judgment which require realistic appraisal of the totality of case, examining every factor which migh inform as to the influence of an error. It seeks realism.

Harmless error thus eschews abstract analysis:

> These are the abstract similarities. They are only abstract. To strip them from the separate and distinct total contexts of the two cases, and to disregard the vast differences in those contexts, is to violate the whole spirit, and we think the letter also, of [the harmless error rule].

Id. at 772.

Hence, Justice Rutledge insisted, error must be assessed "in relation to all else that happened." Id. at 764. Its measurement takes account not only of the nature of the error, but also its timing, other instructions, the evidence, everything.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight

> effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,. . . or if one is left in grave doubt, the conviction cannot stand."

Id. at 764-65 (emphasis added).

The Kotteakos Court left open the possibility that violation of certain constitutional norms might be reversible per se. Id. at 764-65. Equally, it expressed respect both for the rationality and necessity of jury decisionmaking on vital points, refusing to countenance a construction of instructions which would have premised the verdict on a view which, in context, it was probable the

jury had not adopted. See id. at 769-74, citing Bollenbach v. United States, 326 U.S. 613 (1946).

In Chapman v. California, 386 U.S. 18, the Court extended the principles outlined by Justice Rutledge to review of most constitutional error. The significance of evidence as an aid to right judgment was expressly affirmed in Harrington v. California, 395 U.S. 250 (1969). The Court held that even Bruton error, error consisting in the admission of evidence too potent for the jury to have ignored, could be found harmless if there was other overwhelming evidence of guilt.[3/] Consideration of the

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3. Bruton v. United States, 391 U.S. 123 (1968)(admission of non-testifying codefendant's confession denied defendant's confrontation rights notwithstanding limiting instruction, because evidence was of such force that the jury might not have ignored it as directed).

"evidence in this record," Justic Douglas wrote for the Court, "do[es] no depart from Chapman; nor . . . dilute i by inference." "Our judgment must b based upon our own reading of the recor and what seems to us to have been th probable impact of the two confessions o the minds of the jury" in light of th totality of circumstances. Id. at 25 (emphasis added).

Equally, in Schneble v. Florida, 40 U.S. 427 (1972), the Court reaffirmed th Kotteakos principle of respect for th rationality of jury decisionmaking:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions,

stares us in the face.

Id. at 431-32. The confession rationally must have been considered by the jury, but in light of other evidence in the case, it was held not to impeach the validity of the verdict. Id. at 432.

The Court has not departed from this approach in its more recent cases. In Strickland v. Washington, 104 S.Ct. 2052 (1984), and United States v. Cronic, 104 S.Ct. 2039 (1984), the Court held that even a breakdown in the assistance of counsel does not require reversal unless prejudice is shown. Assessment of counsel's performance, Justice Stevens wrote, ought not to be made in the abstract, but in terms of its impact upon the fairness of the entire trial. Cronic, 104 S.Ct. at 2046 n.22. The value of counsel -- and hence the measure of prejudice -- is its contribution to the reliability of the trial

process. Id. at 2045-46. When con
fidence in the reliability of the out
come, the justness of the result, i
undermined by counsel's deficiency
prejudice exists. Strickland, 104 S.Ct
at 2063-64, 2068.

Similarly, in United States v
Agurs, 427 U.S. 97 (1976), and Unite
States v. Hasting, 461 U.S. 499 (1983)
the Court confirmed examination of th
record as a whole as vital to assessmen
of the justice of a conviction. "[T]h
omission must be evaluated in the contex
of the entire record," Justice Steven
wrote in Agurs. "If there is no reason
able doubt about guilt whether or not th
additional evidence is considered, then
is no justification for a new trial."
Id. at 112-13 (materiality of prosecu
torial failure to disclose measured i
terms of impact upon the outcome). "
reviewing court must begin with . .

reality," Chief Justice Burger wrote in Hasting. 461 U.S. at 511 (prosecutorial misconduct, Griffin comment). Automatic reversal is a "'retrea[t] from . . . responsibility,'" a return to the "'citadels of technicality.'" Id. at 509. "'The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.'" Id. at 516 (Stevens, J., conc.)(emphasis added), quoting Kotteakos v. United States, 328 U.S. at 764.

Likewise, in Henderson v. Kibbe, 431 U.S. 203 (1977), and Cupp v. Naughten, 414 U.S. 141 (1973), the Court insisted that prejudice must be gauged "in the context of the overall charge," a context which included the testimony of witnesses, arguments of counsel, receipt of exhibits, as well as other instructions by the judge. Cupp, 414 U.S. at

147. In context, despite "abstract and conjectural" contrary possibilities, the ailing instructions were not of "constitutional dimension," as their deficiencies could not have "'so infected the entire trial that the resulting conviction violates due process'. . . ." Kibbe, 431 U.S. at 154, 156-67; Cupp, 414 U.S. at 147, 149-50.

The Court has confirmed the necessity of a showing of prejudice even against contentions of burden-shifting, presumption-spawned error. United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982). Of the two, Frady is more pertinent as it discussed and applied the standard of "actual prejudice" unalloyed by comity considerations.

The Court did not undertake to define the "degree of prejudice" necessary to reversal, holding it a

variable concept proportionate to the impact which renders a conviction a violation of due process. This formulation, it ruled, "requires that the degree of prejudice . . . be evaluated in the total context of the events at trial." Id. at 169.

The Frady Court rejected the argument that an instruction which may have relieved the Government of the burden of proving an element of the crime beyond a reasonable doubt was of itself enough to overturn the conviction:

> So stated, Frady's claim of actual prejudice has validity only if an error in the instructions concerning an element of the crime charged amounts to prejudice per se, regardless of the particular circumstances of the individual case. Our precedents, however,

> hold otherwise. Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

456 U.S. at 170 (emphasis in original) Justice Stevens concurred because th Court's opinion "properly focus[ed] o the character of the prejudice . . . . Id. at 175; accord, Engle v. Isaac, 45 U.S. at 136 & n.1 (application of caus and prejudice rules depends on type o claim, risk of fundamental miscarriage o justice).

Some of the decisions above assesse prejudice as part of the determination o

whether error occurred. Others considered prejudice only after error had been established. Others, the collateral proceedings, examined prejudice as a factor in deciding whether to overlook a procedural default. But each of them did weigh prejudice at some point in the constitutional equation and all did so in light of the totality of circumstances, including the evidence.

Only one group of cases has been said to reverse without consideration of prejudice, and these cases are better explained as not in fact cases that disregard the need for prejudice but as cases which presume the existence of prejudice. Certain constitutional protections by reason of their "fundamental" character engender such great possibilities of prejudice that are unlikely to be reflected in a record as to make reasonable a presumption of

prejudice without need for actual proof
See, e.g., United States v. Cronic
104 S.Ct. at 2046-47; Strickland v
Washington, 104 S.Ct. at 2067; Hollowa
v. Arkansas, 435 U.S. 475, 489-90 (1978)
Yet the existence of prejudice, actual o
presumed, even in this category of case
remains the ultimate determinant o
reversal.

B.

It is suggested that the Court ough
now to retreat from this steadfast posi
tion and hold presumption error revers
ible per se without regard to prejudice
but upon the abstract possibility o
error alone.

This view posits that instructiona
error which induces a jury to disregar
the necessity of proof of every element
or to find an element upon less tha
proof beyond a reasonable doubt, denie
rights so "fundamental" that the denia

can never be deemed harmless because they are part and parcel of our very definition of due process and justice.

This is irrefutable. When fundamental rights such as these <u>are</u> denied, reversal should follow. We yield to no one in our respect for this principle. Yet how we are asked to arrive at the conclusion that reversible error <u>has</u> occurred is not nearly so persuasive.

Because, exercising abstract logic, we may make out a possibility that the instructions might have been interpreted by a juror to eliminate or shift the burden of proof; and because, adopting the assumption that jurors follow instructions, we are unable to refute the possibility that some juror did apply the instructions in the forbidden manner; and because, citing precedent, the mere possibility that a conviction has been unconstitutionally obtained is

enough to require reversal, reversal is demanded without examination of prejudice. The evidence, the circumstances, even the lack of any actual likelihood that such error did occur, all disappear beneath the blades of this analysis.

As an exercise in logic, it is neat. It does avoid "confusion." Cf. Francis v. Franklin, 105 S.Ct. at 1975 n.8. But as an exercise in the judicial judgment mandated by Kotteakos, it fails.

We cannot agree that a mere abstract possibility of error, a possibility drawn out of a record deliberately shaped to ignore many of the most significant elements of the case, should ever be deemed automatic cause for reversal. The possibility of error is the beginning of judgment, not its end.

The large majority of other courts, state and federal, which have considered this question since Sandstrom have not

found its abstract possibilities such an affront "fundamental" justice as to require automatic reversal without regard to harm. By our count, nine federal circuits and thirteen states now apply some version of Chapman. Only four states have rejected all harmless error rules.[4/] This wide preponderance of opinion should caution strongly against adopting the abstract, automatic view.

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4. E.g., United States v. Winter, 663 F.2d 1120, 1144 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); Fournier v. LeFevre, 734 F.2d 125, 129 (2d Cir. 1984); Tweety v. Mitchell, 682 F.2d 461, 465 (4th Cir. 1982), cert. denied, 460 U.S. 1013 (1983); Fulton v. Warden, 744 F.2d 1026, 1032-34 (4th Cir. 1984), cert. denied, 105 S.Ct. 3532 (1985); Mason v. Balkcom, 669 F.2d 222, 226-27 (5th Cir. 1982), cert. denied, 460 U.S. 1016 (1983); Holloway v. McElroy, 632 F.2d 605, 618 (5th Cir. 1980), cert. denied, 451 U.S. 1038 (1981); United States v. Crowder, 719 F.2d 166, 172-73 (6th Cir. 1983) (en banc), cert. denied, 104 S.Ct. 2352 (1984); Jacks v. Duckworth, 651 F.2d 480, 487 (7th Cir. 1981), cert. denied,

(Footnote continued on next page.)

The idea that jurors must be assume
to have adopted a worst-case hypothesi

Footnote 4 continued:

454 U.S. 1147 (1982); Nelson v. Solem, 640 F.2d 133, 136 (8th Cir. 1981); Hagler v. Callahan, 764 F.2d 711, 714-15 (9th Cir. 1985); Davis v. Kemp, 752 F.2d 1515, 1520-21 (11th Cir.)(en banc), cert. denied, 105 S.Ct. 2689 (1985); State v. Forrester, 657 P.2d 432, 439 (Ariz. Ct.App. 1982); Evans v. People, No. 83SC451 (Colo. Sept. 30, 1985); Parker v. Pace, 331 S.E.2d 546, 546-47 (Ga. 1985); State v. Heads, 385 S.2d 230, 231-32 (La. 1980); Commonwealth v. Gonzales, 470 N.E.2d 403, 404 (Mass. 1984); DeJoinville v. Commonwealth, 408 N.E.2d 1353, 1358 (Mass. 1980); State v. Boyce, 471 A.2d 687 (Me. 1984); People v. Wright, 289 N.W.2d 1, 11-12 (Mich. 1980); State v. McKenzie, 608 P.2d 428, 458-59 (Mont. 1980), cert. denied, 449 U.S. 1050 (1980); People v. Mitchell, 461 N.Y.S.2d 267, 271 (N.Y. 1983); State v. Amado, 433 A.2d 233, 238-41 (R.I. 1981); State v. Gaskins, 326 S.E.2d 132, 142-43 (S.C.), cert. denied, 105 S.Ct. 2368 (1985); State v. Bolin, 678 S.W.2d 40, 45 (Tenn. 1984); Director v. Jones, 329 S.E.2d 33,37 (Va. 1985); Saldana v. State, 685 P.2d 20,23 (Wyo. 1984), cert. denied, 105 S.Ct. 2331 (1985). Contra, State v. Truppi, 438 A.2d 712, 721 (Conn. 1980), cert. denied 451 U.S. (1981); Minor v. United States, 475 A.2d 414, 416 (D.C. 1984); State v. LaForge, 347 N.W.2d 247, 256 (Minn. 1984); State v. Martell, 465 A.2d 1346, 1348 (Vt. 1983).

of instructions is inconsistent with the acknowledgment that in Bruton cases jurors are expressly assumed to have disregarded instructions. See Francis v. Franklin, 105 S.Ct. at 1976 n.9. The theory is that the prejudice of a confession can overwhelm even the clearest and most express limiting instruction. If overwhelming evidence can cause a jury to disregard the plainest instruction, surely overwhelming evidence might distract the jury from instructions which at worst are only ambiguous.

The significance of evidence in the construction and application of instructions cannot rationally be disregarded. Indeed, the chief value of a jury consists in the fact that jurors bring to their task a common sense and experience thought more useful to justice than careful parsing of precedent. See Duncan v. Louisiana, 391 U.S. 145, 156-

58 (1968). Rational jurors inevitably will look to the evidence in determining the applicability of instructions and will disregard abstract possibilities that lack real significance. In fact, they may well be instructed to consider only those instructions which their review of the facts shows are pertinent.[5/] Examination of the evidence thus

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5. Standard California Jury Instruction number 17.31 directs the jury:

> You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts.

California Jury Instructions - Criminal, No. 17.31 (4th ed. 1980)(emphasis added).

is essential to any consideration of how a rational jury might reasonably have understood and applied jury instructions.

Precedent confirms this common sense:

> The crucial thing is the impact of the thing done wrong . . . in the total setting. [¶] This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, . . . and not . . . as . . . without reason.

Kotteakos, 328 U.S. at 764 (emphasis added).

A jury is not likely to have followed a difficult road to conviction when a smoother one was plain upon the

evidence. What reasonable juror, whe the evidence of each element is manifes before him, would engage in an awkwar exegesis of instructions in hopes o avoiding the easy path? The reasonabl juror would take up the evidence and hav done with it. Instructional ambiguit would have meaning only if the evidenc required construction of the ambiguit and the potential error was so paten that the evidence would not have tempere its interpretation.[6/]

The cases sometimes cited a requiring reversal upon the mere possi bility the jury relied upon an unconsti tutional construction of instruction have never held this determination shoul

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6. Occam's Razor has value here See Random House Unabridged Dictionary o the English Language 996 (1966)("maxi that assumptions introduced to explain thing must not be multiplied beyon necessity").

be made in the abstract without regard to the totality of the case and the evidence. One of the leading cases, Bollenbach v. United States, 326 U.S. 607 (1946), in fact was cited with approval in Kotteakos for the opposite principle, the principle that in assessing the impact of the thing done wrong on others' minds "the total setting" must be considered. Kotteakos, 328 U.S. at 765. The instructional error in Bollenbach was patent and clearly had had impact on the jury: it returned its verdict five minutes later. In Stromberg v. California, 283 U.S. 359 (1931), the error also was patent and the possibility of impact on the jury was "far from being a merely academic proposition . . . ." Id. at 368. In Carpenters v. United States, 330 U.S. 395 (1947), the error again was patent

and the case was tried upon the unconstitutional theory. In Leary v. United States, 395 U.S. 6 (1969), the jury was expressly told it could convict under alternative theories, one of which was unconstitutional. In Bachellar v. Maryland, 397 U.S. 564 (1970), the jury again was expressly told it could convict under alternative theories; the Court reversed because "[o]n this evidence" it was "equally likely" the conviction had rested on the unconstitutional ground. Id. at 569, 571.

The point of these cases, we respectfully submit, is simply that evidence of guilt alone will not save a conviction which, after consideration of all of the circumstances of the case, including the evidence, has been reasonably established to rest upon possible constitutional error. These cases do not stand for the proposition that the circum-

stances and evidence should be ignored in determining whether that possibility is reasonable.

C.

We regret that the terms of the grant of certiorari preclude from review the apparent rule that the possibility of constitutional error respecting presumptions must be determined in the abstract. In our view, "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" Henderson v. Kibbe, 431 U.S. at 154, ought to be answered after examining the totality of a case, not before. But the prospect of reversal predicated on mere technical analysis is precisely the danger harmless error rules are intended to prevent, and we therefore urge their adoption here.

Harmless error rules are intended to serve, not subvert, constitutional values. "What harmless-error rules all aim at is a rule that will save the good . . . while avoiding the bad, so far as possible." Chapman, 386 U.S. at 22-23. The proper reach of a harmless error rule hence is a function of the constitutional values that are at risk.

Burden-shifting presumptions implicate the constitutional interest in accurate and reliable truth-finding.

> "'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of

> certitude of the facts in issue.'"

Hankerson v. North Carolina, 432 U.S. at 241. To require a defendant "to prove the critical fact in dispute, is to increase . . . the likelihood of an erroneous . . . conviction." Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

As with other constitutional errors presenting questions of the reliability of a verdict, the prejudice requirement does not demand certainty that the result is unreliable, but only a showing that such error as may have occurred has so "undermined confidence in the outcome" that the conviction cannot be regarded as just. See Strickland v. Washington, 104 S.Ct. at 2068; United States v. Cronic, 104 S.Ct. at 2045. The reviewing court must be able to declare its belief that there is no reasonable doubt the verdict is

reliable. Compare Strickland, 104 S.Ct. at 2068-69, and Cronic, 104 S.Ct. at 2045-46, with Chapman v. California, 387 U.S. at 24. This assessment is made not in the abstract, but with a view to the impact of the error on the entire trial. Cf. Cronic, 104 S.Ct. at 2045 n.22. It is familiar territory. See Chapman, 387 U.S. at 24.

Conclusive presumptions, on the other hand, implicate not only the constitutional interest in reliability but also the defendant's interest in a nonjudicial factfinder. To the extent an instruction implicates only the interest in reliability, it may be assessed by the rule described above alone. But to the extent it implicates the interest in a nonjudicial factfinder, judicial assessment of the reliability of the conviction is beside the point. Juries are interposable as of right in part

because jurors as a group may be guided by common sense and community values to a degree not true of an individual judge. Hence, judges reviewing such cases

> are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945).

The reviewing court can ask, however, whether in light of all the evidence and circumstances of trial

there is any reasonable possibility the jury did not decide an essential issue. In understanding the jury's response to instructional ambiguity, as discussed heretofore, the evidence is important. It disrespects the essential rationality of jurors, their vital difference from judges, to assume they would ignore the evidence and leap automatically to constructions which would divert them from their factfinding mission.

Juries are inherently inclined to gauge guilt from facts. It is their special talent, their natural disposition, their raison d'etre. When the evidentiary or factfinding road is plain, the obscure instructional detour is less likely.

Thus, when the evidence of guilt is manifest, and the evidentiary issue was squarely put to the jury with the best force each party could muster, and the

possibility that the jury failed to find the facts pertinent to that issue is contingent on constructions of instructions which have plausibility mainly only in the abstract, there can be good cause to conclude there is no reasonable possibility the jury failed to decide the essential factual issue. See United States v. Frady, 456 U.S. at 171-74; People v. Whitt, 36 Cal.3d 724, 734-35 (1984); People v. Garcia, 36 Cal.3d 539, 554-56 (1984).

Circumstances apart from the evidence and the evidentiary posture of the case as it went to the jury also may justify a finding of harmless error when performance of the jury's factfinding function is in question. The evidentiary issue to which the instructional error relates may have been effectively conceded by the defense, or other instructions or findings may show the

jury necessarily did examine the issue, or the defendant may have been acquitted of the only charge to which the instructional ambiguity had significance. See Connecticut v. Johnson, 460 U.S. at 87; United States v. Frady, 456 U.S. at 171, 174; People v. Garcia, 36 Cal.3d at 554-56; People v. Whitt, 35 Cal.3d at 734-35.

Thus, the fact the defendant in this case challenges the presumptions herein only on the ground they unconstitutionally shifted the burden of proof, and not on the ground they stated a conclusive presumption or otherwise precluded the jury from considering essential issues, is significant to the harmless error analysis. Such a claim concedes the jury did examine the factual issue; it asserts, rather, that the jury decided the issue upon an improper standard of proof. It is an attack upon the

reliability of the conviction, not an assertion the jury was precluded from considering essential facts. As the constitutional value in question here is only the interest in accuracy, not the interest in a nonjudicial factfinder, the appropriate harmless error question is whether, in light of the entire record, there is reasonable cause to doubt the reliability of the verdict.

D.

Whether error justly may be found harmless necessarily does depend upon assessment of the unique circumstances of each case and the implications of the asserted error in light of those circumstances -- in short, upon the exercise of judgment.

That judgment will vary as the circumstances of the case vary is no impeachment of its propriety. Its "malleability" and "inconsistent . . .

results" may sometimes seem a "plague" and a "confusion," see Francis v. Franklin, 105 S.Ct. at 1975 n.8, but the consistency demanded by the Constitution is not that of regular reversal or affirmance, but of respect for basic constitutional principles. Just as we ordinarily assume juries will respect the instruction of judges, we also must ordinarily assume judges will respect the instruction of the Constitution. It cannot legitimately be supposed by this Court that the judges of the inferior courts hold constitutional values in any less consistent esteem than do the members of this Court.

The tests of harm suggested heretofore, we respectfully submit, are fully capable to insure protection of essential constitutional values in each individual case. The Chapman test, after all, was deliberately formulated with a view to

corralling courts hostile to Constitutional rule and to limiting "unfair and mischievous results." See Chapman v. California, 386 U.S. at 21-22, 50; Traynor, The Riddle of Harmless Error 43 (1970). Here, paradoxically, the burden of automatic reversal would fall most heavily not on those courts insensitive to constitutional rights, but on states and courts known already to be open to review and examination of such claims by their waiver of procedural default rules which otherwise would set the security of "prejudice" around convictions. Cf. Hankerson v. North Carolina, 432 U.S. at 244 n.8.

If "prejudice" properly may be demanded in a collateral proceeding when there was no objection to error, notwithstanding contentions that the error compelled the jury to presume malice and relieved the prosecution of its burden

of proof, United States v. Frady, 456 U.S. at 158, 167-70, 172, 174, why not in this collateral proceeding also? Does the circumstance that the defendant in this case belatedly raised the presumption issue in a motion for new trial, and the Tennessee courts willingly considered the contention on its merits on appeal, Brief in Opposition to Petition for Writ of Certiorari, at 8 n.1, so alter the constitutional assessment of justice that reversal must automatically be compelled? Why ought not the same test and requirement of prejudice apply here as there?

We invite the Court to consider any hundred cases and find one in which the risk of unjust conviction or of a material deprivation of jury factfinding will not have been discovered by the harmless error tests outlined above. It is one thing to free one hundred obviously guilty persons to safeguard a

single innocent, but when the single innocent is safe already, what is the point in freeing the guilty? There is a danger in the use of "mechanical formulas that tend to replace discriminating judgment" quite as severe as the danger that harmless error rules might swallow up substantial rights. "A rational test . . . must operate to preserve such rights even as it serves to screen out innocuous errors." Traynor, The Riddle of Harmless Error 19-20 (1970).

We return in our end to our beginning: the costs here are high and we urgently ask the Court to be sure, before adopting any rigid rule, that it is a genuine necessity. We submit it is not necessary here, and hence ask the Court not to retreat from its commitment to judgment.

CONCLUSION

We respectfully submit that the decision of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded for determination of harm in accordance with the standards discussed above.

DATED: December 10, 1985.

Respectfully submitted,

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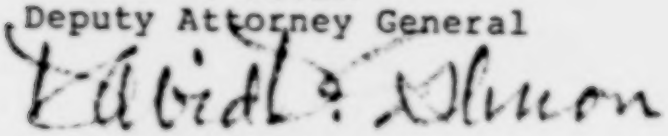

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